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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. 24

HERBERT BROWNELL, JR., Attorney General of the United
States, as Successor to the Alien Property Custodian,
Petitioner,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW
YORK, as Trustee Under Indenture Dated the 21st Day of
March 1928, Between Charles L. Cobb and The Chase National
Bank of the City of New York, *et al.*

**BRIEF FOR RESPONDENT ARTHUR J. O'LEARY, GUAR-
DIAN AD LITEM FOR INFANT RESPONDENTS HANS
ULRICH SCHWARZBURGER, ELIZABETH SCHWARZ-
BURGER, HANS ADOLPH ROTH, HEIDE ROTH, CHRIS-
TEL ROTH, EIKE ROTH, UWE ROTH, ECKARD
ROTH, HANS EBERHARD SCHWARZBURGER, SABINE
SCHWARZBURGER, BERND VOM BAUR CHRISTOPH
ROTT, TILO KOSTER AND SITTA KOSTER**

ARTHUR J. O'LEARY
*Guardian ad litem for Infant
Respondents Hans Ulrich
Schwarzburger et al.*

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BRIEF FOR RESPONDENT ARTHUR J. O'LEARY, GUARDIAN AD LITEM FOR INFANT RESPONDENTS HANS ULRICH SCHWARZBURGER, ELIZABETH SCHWARZBURGER, HANS ADOLPH ROTH, HEIDE ROTH, CHRISTEL ROTH, EIKE ROTH, UWE ROTH, ECKARD ROTH, HANS EBERHARD SCHWARZBURGER, SABINE SCHWARZBURGER, BERND VOM BAUR CHRISTOPH ROTT, TILO KOSTER AND SITTA KOSTER

Question Presented

The sole question presented by the Attorney General on this appeal is the following:

Whether this Court, in its decisions in *Brownell v. Singer*, 347 U. S. 403 and *Zittman v. McGrath*, 341 U. S.

471, has so construed the Trading with the Enemy Act, 50 U. S. C. App. secs. 1, *et seq.*, as to require the New York Supreme Court, in an accounting proceeding brought at the request of the Attorney General (R. 18, 23), to oust itself of jurisdiction of a continuing *inter vivos* trust (R. 160), which is being administered under its supervision by a New York bank as trustee (R. 70), by directing said trustee to transfer to the Attorney General, as successor to the Alien Property Custodian, the accumulated income and corpus of said trust pursuant to an alleged amended vesting order which was filed with the Federal Register on April 9, 1953 (R. 64), a date 18 months after formal termination of the war with Germany (65 Stat. 451; Proclamation 2950, 50 U. S. C. A. App. p. xx), where the following circumstances clearly exist:

(a) that the trust was created on March 21, 1928, long before any freezing or vesting order was made (R. 21);

(b) that one of the remaindermen of the trust is a United States citizen by birth (R. 159, Pl. Ex. 10, R. 253, 186), who was in being prior to the time the alleged amended vesting order was made (R. 159);

(c) that all the remainder interests in the trust are contingent (R. 160) and it cannot be determined at this time to whom the trust fund will be ultimately payable (R. 160).

(d) that the remedy provided by Section 9 of the Act is illusory and inadequate in the instant case (this brief, pp. 10-11);

(e) that there has been a prior judicial proceeding relating to this trust in the New York Supreme Court in which the Attorney General intervened and in which judgment was entered to the effect that said Attorney General is not entitled to the income of said trust and had no authority to exercise the fiduciary powers reserved to Bruno Reinicke, Jr., but that the trustee bank had au-

thority to exercise such fiduciary powers (Pl. Ex. 3, R. 211-223, 183-184; Pl. Ex. 4, R. 229, 184; Pl. Ex. 5, R. 231, 184).

It is respectfully submitted that this Court has not so construed said Act either in the cited decisions or in any other decision.

The Facts

The subject matter of this action is an *inter vivos* trust set up by an indenture dated March 21, 1928, made between Charles L. Cobb as Settlor and The Chase National Bank of New York as Trustee. Although he was named as Settlor, it was determined in a prior action that Charles L. Cobb was not the real creator of the trust but that the actual settlor was Bruno Reinicke.

The trust was created primarily for the benefit of the children of the settlor. The trust agreement (R. 21-33) was made in Chicago, Illinois, on March 21, 1928 and under its terms the trust corpus was granted, conveyed, assigned, transferred, quitclaimed and delivered to The Chase National Bank of the City of New York (R. 21) for the benefit "of the children of Bruno Reinicke, Jr. and Elisabeth Reinicke, his wife, that is to say, Bruno Carl Reinicke and Robert Hans Reinicke and any other children that may hereafter be born * * *" (R. 21). The trustee is directed "to add the net income to the principal of the trust estate unless Bruno Reinicke, Jr. shall * * * direct the trustee to pay the said net income, or some part thereof, to any one or all of his children or to Bruno Reinicke, Jr. or any other person or persons * * *" (R. 22-23).

From the provisions just referred to, it becomes unmistakably clear that title to the corpus is in a trustee. The trustee has complete ownership. The alien interests, that is to say, the unvested interests of alien persons are

contingent. The trustee is to hold the title and ownership: until the death of the survivor of the settlor and his wife; thereupon the principal is to be divided into as many equal shares as there are then children of the settlor surviving, with a provision for children of the settlor who have previously died leaving a descendant or descendants then living (R. 24). The shares in trust for the living children are to be held until the beneficiaries arrive at certain ages when the principal is to be distributed. The children have vested interests subject to being divested and in that sense what they actually have are contingent remainders. If there are no surviving children or descendants of children then provision is made for the distribution of the principal to nephews and nieces and their descendants. The infants I represent are descendants of the nephews and nieces and they have contingent remainders in the entire fund.

Since all the right, title and interest of Bruno Reinicke, Jr., were vested by the Custodian on or about January 29, 1945 (R. 247-251) and since it has been judicially determined that said Bruno Reinicke Jr., could not exercise the powers over the trust given by the indenture to the settlor (R. 221), it is difficult to understand why petitioner has devoted nearly one and a half pages of his brief (pp. 3-4, 24) to detailing such powers. However, it is a fair inference that the purpose of such detail is to create the impression, which is contrary to the fact, that such powers are being actively exercised by an enemy alien.

Summary of Argument

(1) The action of the New York Courts in this case is in harmony with the Trading with the Enemy Act and is not in conflict with the rule in *Brownell v. Singer*, 347 U. S. 403, nor with the rule in *Zittman v. McGrath*, 341 U. S. 471 because neither of those cases is controlling.

Both of those cases involve money owned by enemy aliens. In our case a New York Trustee under a 1928 trust indenture has ownership and possession and the enemy aliens have contingent remainder interests which cannot ripen into ownership or the right to possession except upon the happening of future events. Since the Alien Property Custodian stands in the shoes of these aliens, he cannot acquire anything more than the aliens have and consequently New York Courts have properly refused to adjudicate the destruction of the trust.

(2) The judgment in the prior action (*Chase National Bank v. McGrath*, 301 New York 602) is *res adjudicata*. The judgment in the prior action would be nullified if the Trustee is ordered in this action to turn over the entire fund to the Attorney General.

POINT I

The action of the New York Courts is in harmony with the Statute and does not conflict with the decisions of this Court in *Brownell v. Singer* and *Zittman v. McGrath*.

The action of the New York Courts in this case is in harmony with the Trading with the Enemy Act and is not in conflict with the rule in *Brownell v. Singer*, 347 U. S. 403, nor with the rule in *Zittman v. McGrath*, 341 U. S. 471. Neither of these two cited cases upon which the petitioner relies is applicable here.

The instant case must be distinguished from *Brownell v. Singer*, *supra*, and *Zittman v. McGrath*, *supra*, because of important, relevant, essential and outstanding differences. We are not dealing here with enemy owned property; we are dealing with property owned since 1928 by a New York Trust Company, which is held on *inter vivos* trust for the benefit of at least one American citizen,

which is in the process of administration under judicial supervision and which is not "payable or deliverable to, or claimed by a designated enemy country or national thereof" (Ex. Ord. 9193 as amended, 7 F. R. 5205, 10 F. R. 6917). In the *Singer* case the Custodian vested "the excess proceeds of the liquidation remaining after the payment of creditors" from funds that had been on deposit in an agency of an enemy alien bank, 347 U. S. 403, 405. The Courts of New York adjudged that Singer had a preferred claim on those funds the payment of which was conditional upon Singer obtaining a license from Federal Authorities. (*Singer v. Yokohama Specie Bank*, 299 N. Y. 113, affirmed *sub nom. Lyon v. Singer*, 339 U. S. 841, 94 Law ed. 1323.) But the Alien Property Custodian denied a license to Singer and served a directive that the Superintendent of Banks of New York turn over to him the \$557,561.25 that had been allocated and set aside out of the enemy alien's funds as a reserve for the payment of Singer's preferred claim. The New York Superintendent of Banks applied at Special Term of the Supreme Court for an order authorizing him to turn over the funds to the Alien Property Custodian. That application was denied. Special Term held that while the funds could not be paid to Singer, who had been denied a license, neither should the funds be paid over to the Alien Property Custodian. It was held that this allocated fund for payment of a preferred claim did not constitute "excess proceeds" of the Yokohama Specie Bank and were not encompassed by the Vesting Order of 1943 whereby the Custodian had vested "excess proceeds"—that is proceeds over and above the amounts of approved and allowed claims. Special Term also observed that *Lyon v. Singer*, 339 U. S. 841, which affirmed a judgment adjudicating that Singer had a preferred claim, with payment conditioned upon obtaining a license, does not mean that a license may be arbitrarily withheld. (*In re Yokohama Specie Bank*, 200 Misc. 610; affirmed

no opinion, 280 App. Div. 970; affirmed no opinion, 305 N. Y. 908.) On appeal by the Attorney General to the Supreme Court of the United States, the judgment of the New York Courts was reversed with a *per curiam* opinion, reading:

"Reversed. *Zittman v. McGrath*, 341 U. S. 471, 95 Law ed. 1112, 71 S. Ct. 846." (*Brownell v. Singer*, 347 U. S. 403, 98 Law ed. 803.)

There is a dissenting opinion by Mr. Justice Jackson with whom Mr. Justice Frankfurter and Justice Douglas join.

What was decided and all that was there decided is that the Custodian was entitled to the possession of all the funds in the hands of an agency of an enemy alien even though a creditor had a preferred claim against those funds. That decision has no application to this case which does not involve funds on deposit with an agency of an enemy alien and has nothing to do with creditors or preferred claims.

We turn now to *Zittman v. McGrath*, 341 U. S. 471, 95 Law ed. 1112. There the petitioners had levied an attachment against the accounts of the Deutsche Reichsbank with the Federal Reserve Bank of New York and thereafter obtained default judgments against the Reichsbank but the judgments remained unsatisfied because of the freezing program. The Alien Property Custodian issued a Vesting Order whereby he vested in himself the "right, title and interest" of the German banks and also served on the Federal Reserve Bank a "turnover directive" describing the specific property which he required to be turned over to him "to be held administered and accounted for as provided by law." As Justice Jackson stated, 341 U. S. 471 at 473, the Custodian in the relief asked for "omits any request for a declaration that the attachments are invalid. He asks a decree only that Cus-

todian is 'entitled to possession' of the accounts in their entirety". What was decided there is stated in these words (p. 474):

"In view of these facts, we decide and decide only, that the Custodian has power to possess himself of these funds and to administer them."

The Federal Reserve Bank, a stakeholder had no interest in the funds so ordered to be turned over; these were the funds of the Reichsbank. An attachment, so it was held, does not deprive the Custodian of his power to possess and administer funds of an enemy alien. But in our case we are not dealing with enemy funds nor credits to an enemy alien's account in a New York bank, nor is there any question of the validity or invalidity of attachments. Here the Custodian is not seeking possession of a fund of an enemy alien to be administered for creditors. He seeks possession of the assets of a New York trust held, owned and being administered by a New York trust company under the supervision of the New York Supreme Court. No enemy alien owns the assets of the trust and they are not "payable or deliverable to or claimed by a designated enemy country or national thereof" (Ex. Ord. 9193 as amended). The interests of the enemy aliens are of a contingent nature capable of ascertainment and measurement only upon the termination of the trust and such interests may never ripen into ownership (R. 160). Moreover contingent remaindermen are not entitled to ownership, or possession or control of trust assets.¹

¹ Since the trust indenture contemplates administration by a New York trust company in New York (R. 21, 153), but also provides that the trust shall be performed in accordance with the laws of the State of Illinois (R. 48), the nature of the respective interests and rights of the trustee and of the cestuis, respectively, in the

The petitioner asserts that the Custodian's 1945 Vesting Order in the instant case (R. 67-72) is similar to the "right, title, and interest" vesting order in the first *Zittman* case, 341 U. S. 446, and to the "excess proceeds" order in the first *Singer* case, 339 U. S. 841. Then he asserts that the 1953 amended vesting order is a vesting of *res*, similar to the "turn-over directives" in the second *Zittman* and *Singer* cases, 341 U. S. 471 and 347 U. S. 403. From that stated similarity the petitioner erroneously concludes that he is entitled to immediately take possession and administer assets of an *inter vivos* trust, which are being administered under judicial supervision, which are not owned by aliens and are not in the possession of aliens, and which are not "payable or deliverable to or claimed by a designated enemy country or national thereof" (Ex. Ord. 9193 as amended). What was vested in the *Zittman* and *Singer* cases was property actually owned by enemy aliens as we have shown in our discussion of those cases, *supra*. What is attempted to be vested here is essentially different.

The Trial Court found as a fact that the trust fund and accumulated income is held by the Chase National Bank and is not property "payable to or deliverable to or claimed by" or held for or owned by any person but is to be held administered and disposed of by the Trustee as provided in the Trust Indenture for future distribution not to take effect earlier than the death of Bruno Reinicke,

(Footnote continued from preceding page)

corpus of the trust is governed by either New York law or Illinois law. If the New York law governs, it is clear that the only interest of the beneficiaries is a generic right to enforce the trust and that the trustee has the whole estate both legal and equitable including the right to possession and control of the corpus, *Whitney v. Hudson Trust Co.*, 234 N. Y. 394; *Schenck v. Barnes*, 156 N. Y. 316; *Matter of Wentworth*, 230 N. Y. 176. If Illinois law governs, the trustee has the legal estate and the right to possession and control of the corpus, *Altemeier v. Harris*, 403 Ill. 345, 86 N. E. 2d 229; *Anderson v. Williams*, 262 Ill. 308, 104 N. E. 659.

Jr. and his wife and all income is to be accumulated and added to the principal as provided in the Trust Indenture (R. 160). The Court also found as a fact that at the time of the making of the Amended Vesting Order, dated April 6, 1953, the Respondent Hans Dietrich Schaeffer, grandson of Bruno Reinicke, Jr., was then in being, was an American citizen who has a contingent interest in the trust fund and its accumulated income and may become entitled to the entire principal and income upon termination of the trust (R. 159). That finding was made by a Court having supervision of the trust and there is nothing in the Trading With the Enemy Act which indicates any intent to deprive New York Courts of supervision or jurisdiction over trusts.

Though we are dealing with a trust here, the petitioner would persuade the Court that if he vests the *res*, it is exactly as though he were vesting a *res* consisting of an enemy alien's bank account. But a trust fund is not an enemy alien bank account. Here the trust was created in 1928 whereby property was transferred to a New York Bank; until the trust terminates, on the expiration of two lives in being, ownership is in the trustee. True the persons interested, some of them at least, and only some of them, are enemy aliens, but in the aggregate the entire rights of the enemy aliens, whether vested subject to being divested by death, whether contingent or a mere expectancy are certainly less than the ownership of the trust in its entirety. An American citizen has also a remainder interest. But take the entire fund from the trustee and you leave the beneficiary, if he happens to be an American citizen, without a remedy whereby he may establish his rights. As a contingent remainderman he cannot bring suit on rights as yet undetermined, *Koehler v. Clark*, 170 F. 2d 779; when the trust by its terms terminates his remedy has been lost under a statute of limitations, 50 U. S. C. App. secs. 32, 33, *Pass v. McGrath*, 192 F. 2d 415, cert. den. 342 U. S. 910.

The trustee cannot bring suit under Section 9 (a) of the Act for return of the property because it has no beneficial interest in the property, *Central Hanover Bank v. Markham*, 68 F. Supp. 829. Petitioner cites (Petition, p. 16) two cases, *United States Trust Co. v. Hicks*, 16 F. 2d 286, and *Koehler v. Clark*, 170 F. 2d 779, as authorities for the proposition that a trustee may successfully maintain a suit under Section 9(a) of the Act for the return of property. Neither decision supports such proposition. In the *Hicks* case (*supra*) the suit was brought by an ancillary administrator, c.t.a. who is a fiduciary but is not a trustee. In the *Koehler* case (*supra*), the Court dismissed a suit brought under Section 9 (a) of the Act by the trustees of a testamentary trust. The ground of the dismissal was that the trustees had "no litigable interest" in the trust, 170 F. 2d 779, 783.

It is not without significance that in the period of almost forty years, since the passage of the Trading With the Enemy Act 1917, there has not been presented in this Court a case where the Alien Property Custodian claimed the right to seize the corpus of an existing trust, either testamentary or *inter vivos* in character upon the ground that an enemy alien had a remainder interest therein or upon any other grounds. The cases cited by petitioner (Brief, pp. 15-16), in support of his statement that countless seizures of property held by trustees have been sustained by this Court, upon examination fail to support any such sweeping declaration. *Central Trust Co. v. Garvan*, 254 U. S. 554, involved neither a testamentary nor an *inter vivos* trust: it involved monies of enemy alien insurance companies deposited with a bank to secure creditors and policy holders of those foreign insurance companies, which is a sort of fiduciary relationship essentially different from the *inter vivos* trust involved in the instant case. *In re Miller*, 281 Fed. 764, related to an application by the Custodian for an order

directing trustees to pay over *income payable to enemy aliens*. No attempt was made to seize the corpus of the trust. *Central Hanover Bank v. Markham*, 68 F. Supp. 829, was an action by a trustee under Section 9 (a) of the Act to recover securities which it had turned over to the Custodian and which formed part of the corpus of the trust. The Court granted the Custodian's motion for summary judgment on the ground that *all* beneficial interests in the trust belonged to enemy aliens and the trustee had no beneficial interest in the trust, but the Court indicated that its decision would have been different if one of the beneficiaries had been an American citizen (p. 831) and cited and distinguished *Isenberg v. Trent Trust Co.*, 26 F. 2d 609, on that ground. In *Keppelmann v. Palmer*, 91 N. J. Eq. 67, all the beneficiaries of the trust were enemy aliens: no American citizen had any beneficial interest in the trust.

Petitioner's position is that this Court, in the *Singer and Zittman* cases (*supra*), has construed the Act to mean that the Custodian by his mere fiat, embodied in a *res* vesting order, can seize "any property" even that of an American citizen and even though the remedy given by Section 9 (a) of the Act is illusory and inadequate. We respectfully submit that such an interpretation of the Act would authorize the Custodian to confiscate the property of an American citizen and would render the Act unconstitutional. It is elementary that a construction which would render a statute unconstitutional is to be avoided if possible. Apart from this, petitioner's interpretation is in flat contradiction to the construction placed upon the Act by this Court in *Becker Co. v. Cummings*, 296 U. S. 74, 79, *Henkels v. Sutherland*, 271 U. S. 298, 301, *Kaufman v. Societe Internationale*, 343 U. S. 156, 160 and *Guessefeldt v. McGrath*, 342 U. S. 308, 319.

In *Becker Co. v. Cummings*, 296 U. S. 74, this Court stated (p. 79):

"The seizure and detention which the statute commands and the denial of any remedy except that afforded by Section 9 (a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy either the return of his property or compensation for it." (Emphasis supplied.)

In *Henkels v. Sutherland*, 271 U. S. 298, this Court ruled (p. 301):

"The Government * * * cannot confiscate the actual increment of property, belonging to a citizen * * * any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution."

In *Kaufman v. Societe Internationale*, 343 U. S. 156, this Court ruled (p. 160):

"The innocent stockholder may not have title to corporate assets but he does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies."

Finally, the construction urged by the Custodian is contrary to the long established holding of this Court that federal courts do not have jurisdiction to oust state courts of possession and control of a *res* once the state courts have taken possession and control of such *res*, *Princess Lida v. Thompson*, 305 U. S. 456, *Commonwealth Co. v. Bradford*, 297 U. S. 613, 619. This holding has been applied by this Court to the Trading with the Enemy Act, *Markham v. Allen*, 326 U. S. 490, 494,

Neither the prior judgment nor the judgment appealed from in this action is incompatible with the Federal Pro-

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK

**BRIEF FOR RESPONDENT, THE CHASE NATIONAL
BANK OF THE CITY OF NEW YORK (now The Chase
Manhattan Bank) as Trustee under Indenture dated the
21st day of March 1928; between Charles L. Cobb and
The Chase National Bank of the City of New York**

THOMAS A. RYAN

Attorney for Plaintiff-Respondent

The Chase National Bank of the City of
New York (now the Chase Manhattan
Bank) as Trustee under Indenture dated
the 21st day of March, 1928, between
Charles L. Cobb and The Chase National
Bank of the City of New York.

THOMAS A. RYAN, ESQ.
VINCENT J. DUNN, ESQ.

of Counsel

gram of control over alien property. The judgment directs that "no payment of income, or principal or of accumulated income of the said trust shall be made to any beneficiary without 60 days' written notice to the Attorney General of the United States to be given by registered mail" (R. 177). Consequently on the termination of the trust, the corpus and accumulated income will be available for distribution to the rightful owners thereof. Prior to termination of the trust, that is prior to the events specified in this 1928 Indenture, ownership and possession should remain in the trustee. The alien contingent beneficiaries do not have and never had any greater rights than this and the Attorney General is entitled to no greater rights. The judgment takes nothing from the Attorney General because there is nothing owned by an enemy national at this time.

POINT II

The judgment in the Prior Action is *Res Adjudicata*.

In the prior action brought in the New York Supreme Court by the same plaintiff and against the Attorney General's predecessors and all of the same defendants, except those who were not at that time in being, a judgment was entered on January 30, 1948 which was affirmed by the Appellate Division (276 App. Div. 831) and by the Court of Appeals (301 N. Y. 603). It is the contention of the respondents that the provisions of that judgment are *res adjudicata* as to the main issue raised by the Attorney General in the present action. The Attorney General in his answer admits that he submitted to the jurisdiction of this Court in that prior action (R. 60).

In that prior action the Attorney General of the United States requested leave to intervene and thus submitted to the jurisdiction of this court and requested the court to determine that the Trustee be directed, upon the termina-

tion of the trust, to deliver to the Attorney General the shares of the trust comprised of the persons whose interests were acquired by the Attorney General by Vesting Order 4551 dated January 29, 1945. The same claim is made in the present action as was made in the prior action except that the Attorney General bases his claim upon the same Vesting Order as amended under date of April 6, 1953. He claims that an amendment to a claim has somehow created new rights.

So far as a claim is now made by the Attorney General under an Amended Vesting Order, it need only be said that the Amended Order and the Original Order are of no substantial difference. Neither can operate except on vested rights.

In that prior action the learned Court made, among others, the following adjudications (Plaintiffs' Ex. 3, R. 222):

"9. Tom C. Clark, Attorney General as successor to the Alien Property Custodian of the United States is not entitled to receive the income of the said trust which had been accumulated as of the date of the making of the Vesting Order by the Alien Property Custodian #4551 to wit on January 29, 1945.

"10. The said Tom C. Clark, Attorney General as successor to the Alien Property Custodian is not entitled to receive any part of the accumulated income of said trust held by the said Trustee which has been collected of the said Trustee since the date of the said Vesting Order #4551.

"11. The said Tom C. Clark, Attorney General as successor to the Alien Property Custodian of the United States is not entitled to receive any income which may be collected hereafter during the lifetime of Bruno Reinicke, Jr., the settlor in the said trust.

"12. The said Tom C. Clark, Attorney General as successor to the Alien Property Custodian has not

succeeded to the powers with respect to the management and disposition of the trust lodged in the said settlor, Bruno Reinicke, Jr. and his wife, Elisabeth Reinicke.

"13. It was the intention of the Settlor that all of the income from said trust and the accumulated income thereof which should not be used for the children of said Bruno Reinicke, Jr. should be accumulated for the benefit of those ultimately entitled to take the corpus of the trust upon its termination.

"14. The said Tom C. Clark, Attorney General as successor to the Alien Property Custodian of the United States has no power to change the terms of the said trust indenture dated the 21st day of March, 1928, between Charles L. Cobb and The Chase National Bank of the City of New York, and to confer upon himself property rights superior to these of his predecessors in interest" (R. 222, 223).

The Trial Court, in its opinion in the prior action, Schrieber, J., set forth some of the reasons upon which that judgment in the prior action was based and, among other things, stated:

"The settlor intended that such income as is not used for his children should be accumulated for the benefit of those who are ultimately entitled to the corpus of the trust upon its termination. At this time, remainder interests are essentially contingent and the identity of the ultimate remaindermen is unascertainable. The attorney-general's property rights are simply coextensive with those of the beneficiaries whom he has succeeded. This precludes any power to change the terms of the original indenture and to confer on the attorney-general property rights superior to those of his predecessors in interest.

"Under existing circumstances, the settlor is not entitled to receive in his own right either the income or principal of the trust. Income accumulated from the inception of the trust up to 1937 became a part of the principal. None of the beneficiaries may make claim thereto and this is likewise applicable to the attorney-general. From 1937 to March 21, 1941, the income was applied in quarterly installments to the maintenance of settlor's children by paying the income to the settlor pursuant to his written direction of February 18, 1937. The income has been accumulated since March 21, 1941.

"I hold, accordingly, that the income accumulated since March 21, 1941, now constitutes part of the corpus, that the attorney-general has no power over the disposition of the income accumulated since March 21, 1941, and of the income to accrue thereafter, that the attorney-general has not succeeded to any power of management or disposition and that the trustee is authorized to exercise its discretion in the sale of securities and reinvestment of the proceeds thereof during the period when no communication can be had with the settlor or his wife." 76 New York Supp. 2d 63, p. 965, 66.

The judgment in the prior action is *res adjudicata* for the reason that the same claim is being made now as was made then except for this difference: the claim has been enlarged. In other words, the Attorney General is claiming just as much and more in this action as was denied to him in the prior action.

The Attorney General argues that his case now depends upon an *amended vesting order* and that the amendment *does not* circumvent the prior state court decision. But the contrary is obvious. The prior state court decision

would be nullified if the Attorney General can now obtain possession of the entire fund. The prior state court decision held that the Attorney General "is not entitled to receive any part of the accumulated income of said trust which has been collected by the Trustee since the date of the said Vesting Order # 4551" (R. 222). That accumulated income is in excess of \$116,000 (See Sched. A-1 of Acct., R-260). Now in the present action the Attorney General demands the entire fund *including* that *accumulated income* which was denied to him in the prior action. To grant that request would not only circumvent the prior judgment, it would destroy it.

Petitioner, in his brief to this Court (p. 14) states that a "*res*" vesting has substantially the same legal effect as a "turnover" demand. Petitioner in the prior proceeding relating to this trust made a "turnover" demand which the New York Court of Appeals ruled upon and held invalid (R. 197). It necessarily follows from this that petitioner is barred by the previous judgment from relitigating this issue as to the effect of a *res* vesting.

The prior judgment is conclusive "as to any matters actually litigated therein but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first" (*Schuykill Fuel Corp. v. Nieberg*; 250 N. Y. 304, pp. 306/307).

The same rule is the doctrine of the United States Supreme Court (*Baltimore S. S. v. Phillips*, 274 U. S. 351).

The State Court has not been deprived of jurisdiction in cases of this kind. Indeed the Attorney General has recognized the jurisdiction of that Court in the prior action and submitted to it. There is no provision in The Trading With the Enemy Act which expressly deprives the State Court of jurisdiction in actions involving title

to trust property held by a citizen of New York as trustee. No such deprivation should be read into the statute.

Since the prior judgment is conclusive upon the Attorney General's rights with respect to the trust fund, it follows, beyond question, that the parties here are *not relegated* to the relief afforded by *The Trading With the Enemy Act*.

There is no Substantial Legal Difference Between the Original Vesting Order and the Amended Order as the Following Comparison Will Make Evident

(a) The Original Vesting Order

The original Vesting Order Number 4551 is dated January 29, 1945 (R. 247-251). Exactly what was seized by that order is found in the provisions of the order itself which read as follows:

"That the property described as follows:

"All right, title, interest and claim of any kind or character whatsoever of * * * in and to the trust established under a certain indenture of trust dated March 21, 1928 between Charles L. Cobb and The Chase National Bank of the City of New York,

"is property payable or deliverable to, or claimed by, nationals of a designated enemy country, Germany, namely, * * *

"That such property is in the process of administration by The Chase National Bank of the City of New York, as Trustee of the trust established under an indenture of trust dated March 21, 1928 between Charles L. Cobb and The Chase National Bank of the City of New York, acting under the judicial supervision of the Supreme Court of the State of New York, in and for the County of New York;"

"HEREBY VESTS in the Alien Property Custodian the property described above, to be held, used, administered, * * *" (fol. 750).

(b) The Alleged Amendment of the Original Vesting Order

The Amendment to the Vesting Order under which the appellant claims an entirely different set of rights was created, is dated April 6, 1953. That Amendment reads as follows:

"DEPARTMENT OF JUSTICE

OFFICE OF ALIEN PROPERTY

Amendment to Vesting Order 4551

Re: Trust Indenture between Charles L. Cobb and the Chase National Bank of the City of New York dated March 21, 1928, as amended.

File No. D-28-8087; E & T 11214

Vesting Order 4551, executed January 29, 1945, is hereby amended to read as follows:

Under the authority of the Trading with the Enemy Act, as amended (50 U. S. C. App. and Sup. 1-40); Public Law 181, 82nd Congress, 65 Stat. 451; Executive Order 9193, as amended by Executive Order 9367 (3 CFR, 1943 Cum. Supp.; 3 CFR 1945 Supp.); Executive Order 9788 (3 CFR, 1946 Supp.) and Executive Order 9989 (3 CFR 1948 Supp.), and pursuant to law, after investigation, it is hereby found:

1. That Bruno Reinicke, Jr.; Elisabeth Reinicke; Bruno Carl Reinicke; Robert Hans Reinicke; Johanne Maria Margarete Elisabeth Reinicke; Klaus Reinicke; Hans Egon Schwarzbürger; Ilse Schwarzbürger Roth; Hans Adolf Roth; Heide Roth; Hans Eberhardt Schwarzbürger; Karla Maria Rott vom Baur; Fritz vom Baur; Gerd vom Baur; Roland

Rott; Rose Lore Rott; Fritz Reinicke; Gertrud Ernst; Ella Schwarzburger; Charlotte Rott; the child or children, names unknown, of Bruno Reinicke, Jr., and Elisabeth Reinicke; descendants of any deceased child or children, names unknown of Bruno Reinicke, Jr. and Elisabeth Reinicke; issue; names unknown, of Gertrud Ernst; issue, names unknown, of Charlotte Rott; issue, names unknown, of Ella Schwarzburger; and the heirs at law, names unknown, of Bruno Reinicke, Jr., who there is reasonable cause to believe on or since December 11, 1941, and prior to January 1, 1947, were residents of Germany, are and prior to January 1, 1947, were nationals of a designated enemy country. (Germany);

2. All property in the possession, custody or control of the Chase National Bank of the City of New York, as trustee under a certain indenture of trust dated March 21, 1928, between Charles C. Cobb and the Chase National Bank of the City of New York, as subsequently amended, subject to expenses of administration, is property which is and prior to January 1, 1947, was within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid nationals of a designated enemy country (Germany);

and it is hereby determined:

3. That the national interest of the United States requires that the persons identified in subparagraph 1 hereof be treated as persons who are and prior to January 1, 1947, were nationals of a designated enemy country. (Germany).

All determinations and all action required by law, including appropriate consultation and certification,

having been made and taken, and it being deemed necessary in the national interest,

THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in section 10 of Executive Order 9193, as amended.

Executed at Washington, D. C. on April 6, 1953.

For the Attorney General:

(Signed) PAUL V. MYRON

Paul V. Myron
Deputy Director
Office of Alien Property"

It would seem to be absolutely clear from a reading of the two documents that we have just quoted that there is no substantial legal difference in what was seized or in what could be seized under either document. The original Vesting Order is a seizure of all property comprised of the "right, title, interest and claim of any kind or character whatsoever" of the Nationals named in that order. The Amendment recites a finding that the named Nationals were and are residents of Germany and that "property in the possession, custody or control of the Chase National Bank . . . as trustee . . . is property . . . owned or controlled by . . . Nationals of a designated enemy country . . .". There then follows the declaration that there is "hereby vested" in the Attorney General "the property described above". Now "the property described above" is nothing else except the rights and interests of the Nationals in the trust fund held by The Chase National Bank. Those are the same rights referred to in the original Vest-

ing Order. To state that in the latter instance under the Amendment the Attorney General is seizing property and that in the original Vesting Order the Attorney General was seizing the right, title and interest to the same property is to state something having no essential legal difference in meaning.

It is well settled that where the custodian goes into a State Court and submits his rights to the jurisdiction and judgment of that Court, he cannot later be heard to claim that such State Court did not have jurisdiction to adjudicate such rights, *Matter of Thekla*, 266 U. S. 328, 339.

CONCLUSION

The action of the New York Courts is in harmony with the Statute and does not conflict with the decisions of this Court in *Brownell v. Singer* and *Zittman v. McGrath*. The final judgment of the New York Court of Appeals in the prior action is *Res Adjudicata*.

Respectfully submitted,

ARTHUR J. O'LEARY
Guardian ad litem for Infant
Respondents Hans Ulrich
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